

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF TEXAS
3 MARSHALL DIVISION

3 VERSATA SOFTWARE, INC.,) Civil Docket No.
4 ET AL) 2:07-CV-00153-CE
5) May 12, 2011
6 VS.) May 13, 2011
7)
8 SAP AMERICA, INC., ET AL)

7 TRANSCRIPT OF JURY TRIAL
8 BEFORE THE HONORABLE CHAD EVERINGHAM
9 UNITED STATES MAGISTRATE JUDGE

9 APPEARANCES:

10 FOR THE PLAINTIFF: MR. SAM BAXTER
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13 Suite 300
14 Marshall, Texas 75670
15 MR. SCOTT L. COLE
16 MR. STEVEN J. POLLINGER
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25 (Proceedings recorded by mechanical stenography,
transcript produced on CAT system.)

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1 P R O C E E D I N G S

2 (Jury out.)

3 LAW CLERK: All rise.

4 THE COURT: Please be seated.

5 Jury Note No. 1 reads: We would like to
6 have a copy of the charge the Judge read to us at the
7 end of the trial. Signed -- I believe it's Larry Luman.

8 My proposed response is: The Court's
9 instructions are given orally and a written copy is not
10 sent back to the jury room.

11 Any objections from the Plaintiff?

12 MR. COLE: No, Your Honor.

13 THE COURT: From the Defendant?

14 MR. MELSHEIMER: Your Honor, I have an
15 objection and a suggestion that the Court consider
16 modifying that to say that if there was -- to inquire if
17 there was a specific part of the charge that the jury is
18 having difficulty recalling in some way, that the Court
19 would bring the jury back in and reread it to them.

20 THE COURT: Okay. I'll -- I'm going to send
21 back the response I've prepared. I don't -- I don't
22 have any reason yet to think that there is a particular
23 portion that they're having difficulty with, but if
24 there is, I'm sure they'll ask me. And if that happens,
25 then I'll be inclined to reinstruct them if it's

1 something I think is necessary.

2 MR. MELSHEIMER: Thank you, Your Honor.

3 THE COURT: All right. Here you go. File
4 the jury note.

5 Stay put.

6 This one says: Need e-mail, Jan. '97 e-mail
7 within SAP, Merkel Neumann. That's what it says. Also
8 signed Larry Luman.

9 Y'all meet and confer and determine what
10 exhibit that is, and once you've identified it, send it
11 back. You don't -- I don't need to be here. You can
12 just send it back to the jury room.

13 MS. FITZGERALD: Just to be clear, did you
14 say Merkel Neumann?

15 THE COURT: That's what it says.

16 MS. FITZGERALD: Okay.

17 THE COURT: Yes.

18 MS. FITZGERALD: I couldn't hear you, sorry.

19 THE COURT: No, you can examine the note.
20 Either side can.

21 Court's in recess.

22 (Recess.)

23 (Jury in.)

24 LAW CLERK: All rise.

25 THE COURT: Please be seated.

1 All right. I've received a note that
2 indicates that you-all would like to go home for the
3 evening then return at 8:30 in the morning, and I'm
4 going to certainly allow you to do that. You're in
5 charge of your own schedules at this point, but the only
6 thing I did want to caution you about is you should not
7 discuss the case with anyone including your fellow
8 jurors until you're all back together in the morning at
9 8:30.

10 So avoid discussing it among those of you
11 who get there ahead of the others. You know, but once
12 you're all back together in the morning, then you should
13 resume your deliberations in accordance with all the
14 Court's prior instructions.

15 Y'all are excused. Again, thank you for
16 your patience, and please travel safely.

17 COURT SECURITY OFFICER: All rise.

18 (Jury out.)

19 THE COURT: All right. Ms. Lockhart, if
20 you'll file the jury note.

21 If you want to examine it, you can read it
22 and see what they asked for.

23 MR. COLE: Okay.

24 THE COURT: Court's in recess until 8:30 in
25 the morning.

1 (Recess.)

2 *****

3 May 13, 2011

4 (Jury out.)

5 LAW CLERK: All rise.

6 THE COURT: Please be seated.

7 All right. Can I see the jury note?

8 All right. We've got a request to send back
9 several exhibits. I understand there is a dispute
10 concerning DX 518, PX 1950, DX 957.

11 What are those disputes?

12 MR. MELSHEIMER: Your Honor, I believe that
13 the only live objection is to 1950, PX 1950.

14 THE COURT: Okay.

15 MR. MELSHEIMER: And I apologize for not
16 alerting the Court's briefing attorney as to that.

17 So, Your Honor, 1950 is a document that is a
18 2010 executive board summary. It was -- a page of this
19 document was shown to the jury, and it was -- it was
20 admitted into evidence. I will note, though, that the
21 parties had disputed quite vigorously -- may I approach,
22 Your Honor?

23 THE COURT: Yes.

24 MR. MELSHEIMER: There were two pages of
25 this exhibit, Your Honor, these two pages right here,

1 that contain revenue -- total revenue information. The
2 Court knows there was a big dispute about that. The
3 Court granted our motion in limine about total revenue.
4 The Court struck the entire market value rule from the
5 case. It was a ministerial error that these two pages
6 were not redacted or removed before the, quote, exhibit
7 was, quote, admitted. That -- these pages were not ever
8 shown to the jury. Had they been, it would have alerted
9 us to this issue. This issue is not an issue in the
10 trial. They know that. And I think to -- to allow this
11 to go back in its current form would just -- one, would
12 be a violation of the Court's previous ruling, but, two,
13 it's just a -- it's an oversight that was not followed
14 up on when the exhibit was actually, quote, prepared
15 because those two pages were always a focus of our
16 objections.

17 THE COURT: All right. What's the response?

18 MR. COLE: Well, I guess, Your Honor, the
19 response is the exhibit is admitted into evidence
20 without objection.

21 THE COURT: All right. Well, in view of
22 the -- in view of the number of exhibits, I'm going
23 to -- in view of the number of exhibits, I'm going to
24 let them excise these two pages that weren't used in
25 front of the jury, and the Court previously ruled that

1 that type information was out, so I'm going to allow
2 it -- or I'm going to direct that those two pages be
3 withdrawn from the record.

4 And if you want to make a record, I think it
5 will be Court's 4 now, that I didn't send those back,
6 that will be fine.

7 MR. COLE: Okay. Just to -- let me figure
8 out what pages they are. Just for the record, the Court
9 is removing from PX 1950 -- Mr. Melsheimer make sure
10 this is right -- page with Bate stamp ending 9620 and
11 9621.

12 MR. MELSHEIMER: Yes. Yes, let me just make
13 sure -- I think I got that right. I want to make sure.

14 THE COURT: Okay.

15 MR. MELSHEIMER: Yes.

16 MR. COLE: And I guess, for the record, our
17 objection is the full exhibit was admitted without
18 objection, the Defendants placed a reasonable royalty
19 into evidence through their case-in-chief, and that
20 therefore the Defendants' revenues in some sense are
21 relevant and then Plaintiffs did not emphasize that to
22 the jury in an attempt to prejudice the jury but that
23 excising the information could be prejudicial and the
24 jury may notice that there are pages missing and wonder
25 why that is. So that's our objection.

1 THE COURT: Okay. I'm going to stick with
2 my prior ruling. And DX 957 is in the proper form to go
3 back; is that correct?

4 MR. COLE: Yes, Your Honor.

5 THE COURT: All right. Send them back. Is
6 it my understanding that DX 518 was not ever admitted
7 into --

8 MR. MELSHEIMER: It was never admitted in
9 this trial, and I think they were asking -- I guess the
10 question would be should we tell them that there is no
11 518?

12 THE COURT: I'm going to tell -- I'm going
13 to send a note back that says I've returned the exhibits
14 you've requested with the exception of DX 518, which was
15 not admitted into evidence, therefore, I can't send it
16 in the jury room.

17 Any objection to that response?

18 MR. COLE: No, Your Honor.

19 MR. MELSHEIMER: I'm not trying to tweak it,
20 Your Honor, but there is no Exhibit 518, I guess is
21 really -- I don't want to imply that they -- something
22 wasn't -- wasn't admitted.

23 THE COURT: There was no DX 518 --

24 MR. MELSHEIMER: Yes, sir.

25 THE COURT: -- admitted in evidence?

1 MR. MELSHEIMER: Yes, sir.

2 THE COURT: Okay. I'll change it to that.

3 All right. Ms. Lockhart, if you'll prepare
4 that note. Go ahead and get it ready, and we'll send it
5 back along with the exhibits.

6 COURTROOM DEPUTY: Yes, sir.

7 THE COURT: Mr. Cole, Mr. Melsheimer,
8 Ms. Skinner, I need to see y'all in chambers right back
9 here.

10 (Recess.)

11 (Jury out.)

12 COURT SECURITY OFFICER: All rise.

13 THE COURT: All right. Be seated.

14 Jury Note No. 5 reads: Could we get a
15 calculator? Signed by the foreperson.

16 My response is: Pursuant to Note No. 5,
17 here is a calculator.

18 Any objections from the Plaintiff?

19 MR. BAXTER: No, Your Honor.

20 THE COURT: From the Defendant?

21 MR. MELSHEIMER: No, Your Honor. Do they
22 want my scientific calculator from my iPhone? Guess
23 not.

24 THE COURT: They didn't ask for that
25 specifically.

1 MR. MELSHEIMER: Thank you, Your Honor. I
2 appreciate that.

3 MR. BAXTER: In case they want a square --

4 THE COURT: All right. You can send that
5 note back -- a response back.

6 All right. We'll be in recess pending
7 further communication.

8 (Recess.)

9 (Jury out.)

10 THE COURT: All right. Mr. Cole, we're on
11 the record in Versata against SAP outside the presence
12 of the jury.

13 Proceed, Mr. Cole.

14 MR. COLE: We're on the record to make an
15 objection. The jury's last note asked for a calculator.
16 The suggested response was, yes, you can have a
17 calculator. At the time, neither party realized that
18 the calculator that was actually sent back only has
19 eight digits when Plaintiffs have sought damages in the
20 nine-digit range, and we sought to have the jury
21 provided with an additional calculator that has at least
22 nine digits.

23 The Court has overruled our request, and we,
24 therefore, lodge an objection for the record to the
25 failure to provide the jury with a calculator that adds

1 up to the amount of money that Plaintiffs are seeking.

2 Thank you.

3 THE COURT: Okay. Well, I'm going to -- I
4 haven't overruled the request yet.

5 MR. COLE: Oh, sorry, okay.

6 THE COURT: A request for a bigger
7 calculator has not been made yet. But it was not the
8 Court's intent to send back a calculator that had fewer
9 digits than what you've requested, but I'm concerned now
10 that if I send one back with more digits, that I'm
11 implying that the jury ought to award some number, and
12 if they have a problem with the computational power of
13 the calculator that I've given them, then they can ask
14 me for a new calculator, and I'll look for one, which
15 I'm sure there is somebody here that can find one, all
16 right?

17 MR. COLE: Thank you, Your Honor.

18 THE COURT: Yes, Mr. Pollinger.

19 MR. POLLINGER: I guess the suggestion I
20 would have, Your Honor, is that we don't take -- we
21 don't swap out the calculators, we just give them two
22 calculators.

23 THE COURT: Well, that's what I would do if
24 they asked for another one.

25 MR. POLLINGER: I'll just note for the

1 record a similar thing happened with one of the exhibits
2 which is favorable to the Defendants', Exhibit 957.
3 Originally, a black and white copy was sent back, and I
4 believe a new copy is being sent back that is color, and
5 I think it -- it has not gone back yet?

6 COURTROOM DEPUTY: No.

7 MR. POLLINGER: But if that were to
8 happen -- I think the plan was to do that, they have
9 not. The concern I have with doing that is that it
10 creates a suggestion that that is a particularly
11 important exhibit by giving them the new one. So I
12 think there is the same concern with respect to that, as
13 well as the calculator, Your Honor.

14 THE COURT: Well, it's my understanding that
15 that additional exhibit did not go back, and the clerk's
16 verified that, and so I'm going -- I'll let them ask for
17 another calculator if they need to.

18 MR. POLLINGER: Thank you, Your Honor.

19 THE COURT: I don't think they're going to
20 be confused if the numbers -- I think they'll understand
21 that the calculator doesn't go up high enough if they're
22 intending to award you your damage model.

23 MR. POLLINGER: Thank you, Your Honor.

24 THE COURT: Now, something came up -- or
25 someone handed up a proffer expert report -- rebuttal

1 expert report of Stephen Becker on damages.

2 MR. MELSHEIMER: Thank you, Your Honor.

3 This was the issue that we conducted in a
4 sidebar, and the Court asked for a court's exhibit.
5 This was a proffer on our request that Dr. Becker be
6 allowed to testify about his interviews with account
7 executives at SAP as part of his rebuttal analysis to
8 the value of the patented invention and specifically the
9 issue of use.

10 The Court in limine -- or, actually, I guess
11 in a motion to strike granted the Plaintiffs' request
12 that he not be allowed to testify on the basis of those
13 accounting review executives and related materials, and
14 we -- the Court asked me to provide an exhibit to the
15 Court to memorialize that, and we've done so.

16 THE COURT: Okay. Is there any objection to
17 the proffer?

18 MR. COLE: I mean, I don't recall the
19 sidebar. Obviously, we would not agree that if there
20 was a waiver previously that we would agree there's not
21 a waiver, but putting that aside, we have no objection
22 at this time.

23 THE COURT: Okay. Well, I had requested the
24 opposition paper. I indicated that you could make your
25 proffer based on the opposition papers to the motion.

1 Was his rebuttal report a part of the opposition papers?

2 MS. SKINNER: The opposition paper -- the
3 opposition papers were submitted as Court's Exhibit 3,
4 I'm being told, Your Honor.

5 THE COURT: Right, but, I mean --

6 MS. SKINNER: I believe there may have been
7 a miscommunication that we also believed you wanted the
8 rebuttal report of Mr. Becker, and if that was not the
9 case --

10 THE COURT: Well, there was an additional
11 request at sidebar I believe before Mr. Becker went on
12 or at some point during his testimony by Mr. Melsheimer
13 about it. Listen, I'm going to receive it as Court's
14 Exhibit 5. I don't think that -- I don't think that
15 there was a prior waiver of it, but it's limited to
16 the -- what his proffered testimony would be on the
17 question of those surveys, the customer interviews.

18 MR. MELSHEIMER: Yes, sir, that's what --
19 absolutely, it was the motion to strike that was granted
20 that he wasn't allowed to testify about that particular
21 aspect of his report, and we're just proffering that to
22 preserve that objection and that ruling.

23 THE COURT: You apprise me of that, and I've
24 allowed you to do it this way --

25 MR. MELSHEIMER: Thank you, Your Honor.

1 THE COURT: Becker's rebuttal report is
2 received as Court's Exhibit 5.

3 MR. MELSHEIMER: Are we in recess, Your
4 Honor?

5 LAW CLERK: All rise.

6 (Recess.)

7 COURT SECURITY OFFICER: All rise for the
8 jury.

9 (Jury in.)

10 COURT SECURITY OFFICER: All rise.

11 THE COURT: Please be seated.

12 There's a lot of up and down here, and I'm
13 sorry.

14 All right. Mr. Luman, I've been advised
15 that y'all have reached a verdict; is that correct?

16 MR. LUMAN: That is correct, Your Honor.

17 THE COURT: If you don't mind, please pass
18 it to the Court's security officer and he'll hand it to
19 me.

20 Okay. What I'm going to do is I'm going to
21 read the question number along with the jury's answer
22 and not read the entire question.

23 Question No. 1: Claim 26, yes. Claim 28,
24 yes. Claim 29, yes.

25 Question No. 2: Yes.

1 Question No. 3: Yes.

2 Question No. 4: \$260 million.

3 Question No. 5: \$85 million.

4 Signed the 13th day of May, 2011. Larry
5 Luman, jury foreperson.

6 Now, at this time, ladies and gentlemen, if
7 that reflects your verdict, I need you to stand at this
8 time.

9 All right. Let the record reflect that each
10 of the eight jurors are standing indicating a unanimous
11 verdict. You may be seated.

12 Ladies and gentlemen, I'm about to discharge
13 you at this time. These cases are very difficult. They
14 are complex. They are expensive to try for the lawyers
15 and for the parties. And your patience and attention
16 throughout the proceedings is appreciated by both the
17 Court as well as the parties to the case.

18 I have -- the rules of this district prevent
19 lawyers and the parties to the cases from reaching out
20 to you and contacting you about your jury service. What
21 they don't prevent, though, is you contacting lawyers
22 about -- or the parties about your jury service. But
23 you can contact whoever you want or you cannot contact
24 whoever you want. It's entirely up to you.

25 So, in other words, you can talk about your

1 jury service at this point or you cannot talk about it.
2 You have the right to be left alone and the lawyers will
3 not be -- they are prohibited from talking to you.

4 If you are to see a lawyer on the square and
5 you want to wave him over, though, or her over and visit
6 with them, you're -- you're free to do that, but make
7 sure that you want to do that because I can assure they
8 will want to talk to you if you wave them over.

9 So you've got, again, the thanks of the
10 Court and the parties for your hard work this week. You
11 are discharged at this time from jury duty.

12 If you would please remember to return your
13 buttons to the clerk's office, that way Ms. Anderson
14 will at least not be on me all next week about why I
15 gave her buttons away, okay?

16 Y'all are excused. Thank you, again.

17 COURT SECURITY OFFICER: All rise for the
18 jury.

19 (Jury out.)

20 THE COURT: All right. Ms. Lockhart, if
21 you'll file the verdict.

22 Anything from the Plaintiff at this time?

23 MR. BAXTER: No, Your Honor.

24 MR. COLE: Withdraw our objection on the
25 calculator.

1 THE COURT: From the Defendant?

2 MR. MELSHEIMER: Nothing, Your Honor.

3 THE COURT: All right. This case has been
4 pending for some time.

5 Mr. Cole --

6 MR. COLE: Yes, Your Honor.

7 THE COURT: -- I will receive your proposed
8 form of judgment a week from today.

9 MR. COLE: Okay.

10 THE COURT: I am not inclined to find the
11 case to be exceptional. I am inclined to award
12 pre-judgment interest at the 90-day T-bill rate average
13 at the year end, and if you want to pitch to me why you
14 think I ought to award more than that, you can, but I
15 would suggest that you submit to me a proposed form of
16 judgment that computes pre-judgment interest at that
17 rate.

18 I will set a hearing on your proposed form
19 of injunction early next week. I will set the hearing
20 early next week, and I'll try to get to that as quickly
21 as I can.

22 Okay. Court's in recess.

23 LAW CLERK: All rise.

24 (Trial concluded.)

25

1 CERTIFICATION.

2

3

4 I HEREBY CERTIFY that the foregoing is a true and
5 correct transcript from the stenographic notes of the
6 proceedings in the above-entitled matter to the best of
7 my ability.

8

9

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/s/ _____

May 13 2011

11

SHELLY HOLMES, CSR

Deputy Official Court Reporter

12

State of Texas No. 7804

Expiration Date: 12/31/12

13

/s/ _____

May 13, 2011

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GLENDIA FULLER, CSR

Deputy Official Court Reporter

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State of Texas No. 1042

Expiration Date: 12/31/12

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